Supreme Court, U.S.
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No. 00-726

In The

Supreme Court of the United States

SRABANA GUPTA,

Petitioner,

vs.

FLORIDA BOARD OF REGENTS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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5 pp

This case is essentially about whether a court of appeals, in an effort to "police the baseline for hostile environment claims," Mendoza v. Borden, Inc., 195 F.3d 1238, 1244 (11th Cir.1999) (en banc), cert denied, __ U.S. __, 120 S.Ct. 1674 (2000), may undertake the "impossible task" of determining as a matter of law how much of each of a number of factors adds up to an environment so hostile that it illegally robs working men and women of the ability to earn their livings. *See Harris v. Fork Lift Systems, Inc.*, 510 U.S. 17, 24, Scalia, J., concurring (1993).

The case at bar, which the Court of Appeals for the Eleventh Circuit decided prior to this Court's decision in *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. ___, 120 S.Ct. 2097 (2000), is one in which the appeals court panel substituted its judgment for that of the jury. First, it re-decided whether the conduct that caused petitioner Srabana Gupta's clinical depression would be sufficiently offensive to a reasonable person to be against the law.[1]

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[1]The court of appeals stated that

> [W]e have no doubt that Gupta subjectively perceived the alleged harassment to be severe and pervasive. However, the evidence presented at trial does not support a finding that from an objective viewpoint the alleged sexual harassment was so frequent, severe, or pervasive to constitute actionable sexual harassment under Title VII. *See Mendoza*, 195 F.3d at 1246 ("[t]he environment must be one that a reasonable person would find hostile or abusive ...." (citation and internal marks omitted)).

App. 16a. This distinguishes the instant case from those in which there is question about whether the conducted indeed really did any harm. *See Harris*, 510 U.S. at 24, Scalia, J., concurring ("the class of plaintiffs seeking to recover for negligence is limited to those who

(continued...)

Next, the panel decided to credit the explanations that the jury disbelieved as to why Gupta's supervisors denied her both a pay raise and a tenure-clock extension. Neither reversal is consistent with the Seventh Amendment's reexamination clause, with the teachings of *Harris,*[2] or the command of *Reeves.*[3]

The two primary cases upon which respondent relies are both distinguishable and helpful to petitioner. *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011 (2000) decided "only the issue of the authority of a court

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[1](...continued)
have suffered harm, whereas under this statute 'abusiveness' is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation").

[2]The *Harris* Court was explicit in its admonition that

> [T]he appalling conduct alleged in *[Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)], and the reference in that case to environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

(Citations and internal quotation marks omitted).

[3]The respondent attempts to spin the evidence in favor of it, as opposed to in favor of the verdict. *See* Brief in Opposition, at 2-3. Not only does it seek a benign interpretation of Dr. McBride's it's-a-shame comment, *id.* at 3, which is evidence of Dr. McBride's bias against petitioner, but seeks to characterize petitioner's seeking the tenure extension as not being psychiatrically-related, citing a snippet of petitioner's direct examination testimony and ignoring the cross-examination testimony of Associate Provost James Fisher concerning the medical and psychological context in which petitioner sought a tenure extension. *See* R-X -1120-1124.

of appeals to direct the entry of a judgment as a matter of law," 120 S.Ct. at 1016, n. 3, and did so in the context of the rejection by the appeals court of expert testimony that was "the sole evidence supporting plaintiffs' product defect charge." *Neely v. Mark K. Eby Construction Co., Inc.*, 386 U.S. 317 (1967) involved the largely procedural issue of whether an appeals court could order the entry of a judgment notwithstanding the verdict when it decided that the evidence at trial had been insufficient to prove either negligence or causation and the plaintiff had failed to argue for a new trial as an alternative to a defense judgment. The *Neely* court specifically did "not consider whether the Court of Appeals correctly held that petitioner's evidence of negligence and proximate cause was insufficient to go to the jury." 386 U.S. at 321, n. 3. In considering the procedural issues, however, the *Weisgram* court echoed the concern articulated in *Neely* for deference on the issue of a new trial to the district court "because of the trial judge's firsthand knowledge of witnesses, testimony, and issues – because of his 'feel' for the overall case." *Weisgram*, 120 S.Ct. at 1015, quoting *Neely*, 386 U.S. at 325. Both opinions referred to these as "valid concerns to which the court of appeals should be constantly alert."

It is this "'feel' for the overall case" that militates for according a district court's decision on a judgment as a matter of law the same deference as given to such decisions as the grant of a new trial. Respondent's reliance on various circuit cases articulating a *de novo* standard of review – which it notes "arise primarily from discrimination cases" – does not erase the conflict between those cases and the ones cited in the petition which call for a more deferential standard. Indeed, the divide illustrates the manner in which courts of appeal treat employment discrimination lawsuits differently than

they do other civil litigation — which they should not.

Among the cases cited by respondent specifying a *de novo* standard of review for Rule 50 decisions is *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied sub nom, Combs v. Mental Craft Co.*, 522 U.S. 1045 (1998). Because *de novo* review is the rule in the Eleventh Circuit, petitioner did not raise that issue in her initial brief. She did, however, raise it in her petition for rehearing en banc, which sought to have the full court of appeals address the issue and modify the standard. The question of whether the existence of a hostile environment of an issue of law, for the court, or fact, for the jury, likewise was addressed in the petition for rehearing en banc following the panel's fact-intensive re-examination of the evidence.[4]

Respectfully submitted,

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[4]The instant case was fully briefed prior to the Eleventh Circuit's *en banc* decision in *Mendoza*, which essentially changed the rules of the game. Indeed, in a special concurrence, one of the panel members noted that "the hostile environment sex discrimiatnion claim could not survice the analysis prescribed by this circuit's decision in [*Mendoza*]. App. 37a, Rooney, J., concurring.